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EXAMINER

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Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/516,663
Filing Date: November 30, 2004
Appellant(s): WARMERDAM ET AL.

Gary R. Tanigawa
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed April 23, 2009 appealing from the
Office action mailed November 21, 2008.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,446,014	Schuppiser et al	8-1995
5,552,151	Noordam et al	09-1996
EP 0867124	De Haan et al	9-1998
EP 1068809	Ang	1-2001
EP 1174039	Isom et al	1-2002

Suloff, E., "Comparative study of semisynthetic derivative of natamycin and the parent antibiotic on the spoilage of shredded cheddar cheese," Thesis for the degree of Master of Science in Food Science and Technology, Virginia Polytechnic Institute and State University, Blacksburg, VA (December 2, 1999).

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-18 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Suloff, Isom et al (EP 1174039) and Ang (EP 1068809) in view of Noordam et al (US 5552151), De Haan et al (EP 0867124), and Schuppiser et al (US 5446014).

Suloff discloses a method for preventing nozzle clogging during spraying of shredded cheese with an aqueous composition comprising natamycin to protect against fungal spoilage, wherein shredded cheese is tumbled with an anti-caking agent and

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sprayed with natamycin (see entire document, for example page 83, Sample Production).

Isom et al (EP 1174039) disclose a conventional cheese process where the cheese is coated with an anti-caking agent (e.g. cellulose) and natamycin (see entire document, especially Figure 1, paragraph 0004, and claims 8 and 9).

Ang (EP 1068809) discloses treating cheese (e.g. shredded) with natamycin and an anti-caking agent such as cellulose, microcrystalline cellulose, starches and combinations thereof (see entire document, especially paragraphs 0027-0029, and 0037)

The claims differ as to the use of a thickening agent and the specific recitation of nozzle clog prevention.

Noordam et al (US 5552151) disclose stable natamycin compositions for application to cheese comprising natamycin and xanthan as a thickening agent (see entire patent, especially claims 1, 4, and 6).

De Haan et al (EP 0867124) disclose an anti-fungal composition for application to cheese comprising natamycin and xanthan (see entire document, especially page 3, lines 20-29).

Schuppiser et al (US 5446014) disclose the use of xanthan gum to provide a precipitate-free composition to prevent nozzle clogging during agricultural treatment (see entire document, especially claim 1).

It would have been obvious to a person of ordinary skill in the art, at the time the invention was made, to use xanthan as a thickening agent in combination with

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natamycin as taught by Suloff, Noordam et al (US 5552151) and De Haan et al (EP 0867124) in that of Isom et al (EP 1174039) and Ang (EP 1068809) because xanthan serves to improve the stability of a natamycin composition, and xanthan serves to prevent nozzle clogging.

(10) Response to Argument

Appellant argues that the prior art does not teach the prevention of nozzle clogging using an aqueous composition containing natamycin and a thickening agent. Appellant argues that Suloff teaches away from using a dispersion of natamycin and adding a thickening agent. Appellant argues that Isom et al does not teach a thickening agent. Appellant argues that Ang teaches dry mixing instead of spraying. Appellant argues that Noordam et al and De Haan et al do not teach prevention of nozzle clogging. Appellant argues that Schuppiser et al is not directed to natamycin. Appellant argues that the art is non-analogous and that hindsight reasoning is employed.

Suloff teaches tumbling and spraying of shredded cheese with an aqueous composition comprising natamycin and an anti-caking agent wherein nozzle clogging is prevented (see entire document, for example page 83, Sample Production). Isom et al (EP 1174039) teach a conventional cheese process where the cheese is treated with natamycin and an anti-caking agent (see entire document, especially Figure 1, paragraph 0004, and claims 8 and 9). Ang (EP 1068809) is cited to teach treating cheese (e.g. shredded) with natamycin and an anti-caking agent such as cellulose, microcrystalline cellulose, starches and combinations thereof (see entire document, especially paragraphs 0027-0029, and 0037).

Noordam et al (US 5552151) teach stable natamycin compositions for application to cheese comprising natamycin and xanthan as a thickening agent (see entire patent, especially claims 1, 4, and 6). De Haan et al (EP 0867124) teach an anti-fungal composition for application to cheese comprising natamycin and xanthan (see entire document, especially page 3, lines 20-29). Schuppiser et al (US 5446014) teach the use of xanthan gum to provide a precipitate-free composition to prevent nozzle clogging during agricultural treatment (see entire document, especially claim 1).

All of the claimed components and process steps are taught by the prior art. The treatment of shredded cheese with an anti-caking agent, the treatment of shredded cheese with natamycin, the use of an aqueous composition, and the use of xanthan to prevent nozzle clogging is taught by the prior art. It is further noted that Applicant neither claims nozzle size nor identifies any clogging parameters. Certainly, nozzle size plays a role in clogging. Appellant is using known components and process steps to obtain no more than expected results

In response to appellant's argument that the art is nonanalogous, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, Schuppiser et al is directed to the treatment of agricultural products, wherein Appellant discloses food, feed, and agricultural products.

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In response to appellant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the appellant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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Primary Examiner, Art Unit 1794

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